

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

**Feb 20, 2025**

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,  
Plaintiff,

v.

ANTOINE WILLIAM FITZGERALD,  
Defendant.

No. 2:24-CR-0059-RLP

ORDER ON MOTION TO  
DISMISS INDICTMENT

Before the Court is Defendant Antoine Fitzgerald's motion to dismiss the Indictment, charging him with failing to register as a sex offender in violation of 18 U.S.C. § 2250(a) (ECF No. 30). Oral argument was held on February 18, 2025. Mr. Fitzgerald was present and represented by Adrien L. Fox of the Federal Defenders of Eastern Washington and Idaho. Assistant United States Attorney Frieda K. Zimmerman appeared on behalf of the Government.

The charge in the Indictment is predicated on Mr. Fitzgerald's 1997 conviction for attempted rape in the second degree in violation of Washington law. ECF No. 30. In his motion, Mr. Fitzgerald argues the Indictment should be

ORDER ON MOTION TO DISMISS -- 1

1 dismissed because his 1997 conviction is not comparable to a Tier II or III  
2 predicate offense under 18 U.S.C. § 2250(a). The Court finds Mr. Fitzgerald’s  
3 1997 is comparable to a Tier III offense and, as a result, denies Mr. Fitzgerald’s  
4 motion.

### 5 BACKGROUND

6 Mr. Fitzgerald pleaded guilty to the crime of attempted rape in the second  
7 degree, former RCW 9A.44.050(1)(a) (1993) and 9A.28.020(1) (1994) in 1997.  
8 The current Indictment charges Mr. Fitzgerald with failure to register as a sex  
9 offender on or about April 16, 2024, in violation of the federal Sex Offender  
10 Registration and Notification Act (“SORNA”). *See* ECF No. 1.

11 SORNA’s registration requirements differ depending on the “Tier” of a  
12 predicate sex offense. 34 U.S.C. § 20911. In relevant part, a Tier III offender is a  
13 sex offender whose offense is “comparable to or more severe than” aggravated  
14 sexual abuse (as described in section 2241 of Title 18). 34 U.S.C. § 20911(4)(A)(i).  
15 A Tier III offender is required to maintain a current registration for his or her entire  
16 life. 34 U.S.C. § 20915(a)(3). A Tier II offender is, in relevant part, “a sex offender  
17 other than a tier III sex offender” and whose offense is “comparable to or more  
18 severe” than “abusive sexual contact (as described in section 2244 of Title 18)”  
19 when committed against a minor. 34 U.S.C. § 20911(3)(A)(iv). A Tier II offender  
20 is required to register for twenty-five years. 34 U.S.C. § 20915(a)(2). A Tier I

1 offender is “a sex offender other than a tier II or tier III sex offender.” 34 U.S.C. §  
2 20911(2). Tier I offenders must maintain their registration for fifteen years. 34  
3 U.S.C. § 20915(a)(1).

4 Mr. Fitzgerald has filed a motion to dismiss the Indictment. He concedes his  
5 1997 conviction qualifies as a sex offense under SORNA. But he argues the  
6 offense is not comparable to a Tier II or Tier III sex offense. According to Mr.  
7 Fitzgerald, his conviction qualifies as only a Tier I offense and because more than  
8 fifteen years have passed, he was no longer required to register under SORNA at  
9 the time of his offense conduct date. As a result, he argues the Government cannot  
10 sustain its SORNA charge against him. The Government responds that Mr.  
11 Fitzgerald’s conviction qualifies as a Tier III sex offense because it is comparable to  
12 aggravated sexual abuse in violation of 18 U.S.C. § 2241.

### 13 ANALYSIS

14 When evaluating whether a conviction is “comparable to or more severe  
15 than” a federal crime within the meaning of SORNA, the Ninth Circuit uses the  
16 categorical approach. *United States v. Cabrera-Gutierrez*, 756 F.3d 1125, 1133  
17 (9th Cir. 2014). Under the categorical approach, the Court is to compare the  
18 elements of attempted rape in the second degree with the elements of attempted  
19 aggravated sexual abuse under 18 U.S.C. § 2241. *See United States v. Descamps*,  
20 570 U.S. 254, 260-61, 133 S.Ct. 2276, 186 L.Ed. 2d 438 (2013). Thus, Mr.

1 Fitzgerald’s prior conviction may properly serve as a predicate for his  
2 classification as a Tier III sex offense if the Washington statute for attempted rape  
3 in the second degree is defined more narrowly than, or has the same elements as,  
4 the “generic” federal crimes. *Cabrera-Gutierrez*, 756 F.3d at 1133. If, however,  
5 attempted rape in the second degree “sweeps more broadly” than the federal  
6 crimes, Mr. Fitzgerald’s prior conviction cannot serve as a statutory predicate for  
7 his Tier III classification. *Id.* (quoting *Descamps*, 570 U.S. at 261).

8 The “key” to the categorical comparison is only the “‘statutory  
9 definitions’—i.e., the elements—of a defendant’s prior offense and *not* ‘to the  
10 particular facts underlying’” the conviction. *Descamps*, 570 U.S. at 261 (emphasis  
11 in original) (quoting *Taylor v. United States*, 495 U.S. 575, 600, 110 S.Ct. 2143,  
12 109 L.Ed.2d 607 (1990)). The Court must presume Mr. Fitzgerald’s prior  
13 conviction “rested upon [nothing] more than the least of th[e] acts criminalized” by  
14 attempted rape in the second degree. *United States v. Baldon*, 956 F.3d 1115, 1125  
15 (9th Cir. 2020) (alterations in original) (quoting *Moncrieffe v. Holder*, 569 U.S.  
16 184, 190-91, 133 S. Ct. 1678, 185 L.Ed. 2d 727 (2013)). Thus, the Court cannot  
17 consider the facts giving rise to Mr. Fitzgerald’s conviction, even if such facts  
18 establish his conduct was equivalent to federal sexual abuse or aggravated sexual  
19 abuse. *Cabrera-Gutierrez*, 756 F.3d at 1133.

1 Mr. Fitzgerald was convicted of attempted second degree rape in violation of  
2 former RCW 9A.44.050(1)(a) (1993) and 9A.28.020(1) (1994). In 1996, former  
3 RCW 9A.44.050(1)(a) (1993) provided “[a] person is guilty of rape in the second  
4 degree when, under circumstances not constituting rape in the first degree, the  
5 person engages in sexual intercourse with another person . . . [b]y forcible  
6 compulsion”. Under former RCW 9A.28.020(1) (1994), “[a] person is guilty of an  
7 attempt to commit a crime if, with intent to commit a specific crime, he does any  
8 act which is a substantial step toward the commission of that crime.”

9 While a conviction for violation of former RCW 9A.44.050(1)(a) (1993)  
10 alone does not have a specific intent requirement, a conviction for attempted rape  
11 does. *See State v. Aumick*, 73 Wn. App. 379, 383, 869 P.2d 421 (1994), *aff’d*, 126  
12 Wn.2d 422, 894 P.2d 1325 (1995). A conviction for attempted rape in the second  
13 degree in violation of former RCW 9A.44.050(1)(a) (1993) and RCW  
14 9A.28.020(1) (1994) thus requires proof of two elements: (1) the defendant  
15 intended to engage in sexual intercourse by forcible compulsion and (2) the  
16 defendant took a substantial step toward doing so. *See also State v. DeRyke*, 149  
17 Wn.2d 906, 913, 73 P.3d 1000 (2003)).

18 Washington defines sexual intercourse as follows:

- 19 (1) “Sexual intercourse”  
20 (a) has its ordinary meaning and occurs upon any penetration,  
however slight, and

1 (b) Also means any penetration of the vagina or anus however slight,  
2 by an object, when committed on one person by another, whether such  
3 persons are of the same or opposite sex, except when such penetration  
is accomplished for medically recognized treatment or diagnostic  
purposes, and

4 (c) Also means any act of sexual contact between persons involving  
the sex organs of one person and the mouth or anus of another  
whether such persons are of the same or opposite sex.

5 (2) "Sexual contact" means any touching of the sexual or other  
6 intimate parts of a person done for the purpose of gratifying sexual  
desire of either party or a third party.

7 RCW 9A.44.010 (1994).

8 The federal offense for aggravated sexual abuse makes it a crime to  
9 knowingly cause another person to engage in a sexual act "by using force against  
10 that other person". 18 U.S.C.A. § 2241(a)(1). Attempt is expressly provided for  
11 within the federal statute for aggravated sexual abuse, to which we apply the  
12 common law definition. *See United States v. Gracidas-Ulibarry*, 231 F.3d 1188,  
13 1192 (9th Cir. 2000). Attempt at common law required the Government to prove  
14 "that the defendant had the specific intent to commit the underlying crime and took  
15 some overt act that was a substantial step toward committing that crime." *Id.* at  
16 1190.

17 A conviction for an attempted violation of 18 U.S.C. § 2241(a) thus requires  
18 two essential elements: (1) the defendant intended to use force to cause the victim  
19 to engage in a sexual act and (2) the defendant did something that was a substantial  
20 step toward committing the crime. Model Crim. Jury Instr. 9th Cir. 20.2,

1 Attempted Aggravated Sexual Abuse. *See also United States v. Sneezer*, 900 F.2d  
2 177, 178-79 (9th Cir. 1990).

3 A sexual act is defined as:

- 4 (A) contact between the penis and the vulva or the penis and the anus,  
5 and for purposes of this subparagraph contact involving in the penis  
6 occurs upon penetration, however slight;  
7 (B) contact between the mouth and the penis, the mouth and the volva,  
8 or the mouth and the anus;  
9 (C) the penetration, however slight, of the anal or genital opening of  
10 another by hand or finger or by any object, with an intent to abuse,  
11 humiliate, harass, degrade, or arouse or gratify the sexual desire of any  
12 person; or  
13 (D) the intentional touching, not through the clothing, of the genitalia  
14 of another person who has not attained the age of 16 years with an  
15 intent to abuse, humiliate, harass, degrade, or arouse or gratify the  
16 sexual desire of any person

17 18 U.S.C. § 2246(2).

18 Under both Washington and federal law, the intent at issue in an attempt  
19 crime is the that of accomplishing a criminal result. *See, e.g., United States v.*  
20 *Linehan*, 56 F.4th 693, 705-06 (9th Cir. 2022); *DeRyke*, 149 Wn.2d at 913. *See*  
*also* Wayne R. LaFave, *Substantive Criminal Law* § 11.3 (Attempt – the mental  
state) (3d ed. 2024). Thus, under both attempted rape in the second degree in  
violation of former RCW 9A.44.050(1)(a) (1993) and 9A.28.020(1) (1994) and  
attempted aggravated sexual abuse in violation of 18 U.S.C. § 2241(a), the  
prosecution must prove the defendant (1) had an intent to use force to accomplish

1 either penetrative sex or oral sex and (2) a substantial step towards doing so. This  
2 is a categorical match. Mr. Fitzgerald's challenge to the Indictment therefore fails.

3 ACCORDINGLY, IT IS ORDERED that Mr. Fitzgerald's motion to  
4 dismiss, **ECF No. 30**, is **DENIED**. The Clerk of this court shall enter this Order  
5 and forward copies to counsel.

6 **DATED** February 20, 2025

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8 REBECCA L. PENNELL  
9 DISTRICT COURT JUDGE  
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